

# *UK competition law reform*

## *What's at stake?*



The UK Government has begun a consultation on wide-ranging proposals for the reform of the UK competition regime, including changes to the institutional framework and processes, merger control, the criminal cartel offence, and market investigations. This briefing highlights a number of the proposals that are likely to be of particular interest.

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### **Merging the Competition Commission and the OFT**

The consultation paper confirms the Government's previously outlined position; that it is minded to merge the Office of Fair Trading (OFT) and the Competition Commission (CC) to create a single competition regulator, the Competition and Markets Authority (CMA). It now seems almost certain that the merger will proceed. This powerful new body will be responsible for merger control, market investigations and general antitrust investigations (into cartels and abuses of dominance, for example). At present, responsibility for merger and market investigations is shared, with the OFT undertaking the "first phase" investigation but referring mergers or markets considered to require more in-depth scrutiny to the CC for a detailed "second phase" investigation.

### **Guarding against "confirmation bias"**

Whilst the merger of the two institutions may produce limited cost-savings, the Government's main aims are to improve the robustness of decisions and strengthen the UK competition regime, encourage the right cases to be taken and improve speed and predictability for business. The main downside of the proposed merger is that there will no longer be a completely separate institution conducting the crucial second phase of merger and market investigations. Historically this has been viewed as a key protection against supposed "confirmation bias", i.e. the risk of phase one decision makers having an interest in seeing their first phase concerns confirmed in the final second phase decision.

However, the Government has indicated that it is keen to retain as many of the benefits of the existing system as possible and in this context the consultation paper suggests that, within the CMA, responsibility for decisions on second phase merger and market investigations should pass to members of an investigatory panel who had not been involved in the first phase decision. As with panel members of the CC at present, investigatory panel members would be independent individuals drawn from industry and private practice.

### **Other procedural changes – fairness vs speed?**

At present, for general antitrust investigations, the OFT acts as "investigator", "prosecutor" and "judge" on the question of infringement and the level of fine. The OFT has recently announced a number of proposals to improve procedural checks and balances within the context of this current model, as well as to streamline the handling of investigations (following significant criticism of the length of its antitrust investigations).

The consultation paper explores whether additional or alternative changes are required to strengthen procedural checks and balances. The most radical proposal is that the CMA should act only as investigator and prosecutor and should then be required to persuade the independent Competition Appeal Tribunal (CAT) that competition law had been infringed. Other options mooted are the creation of an administrative "Internal Tribunal" and the possibility of mirroring, for antitrust investigations, the division between first and second phases proposed for merger and market investigations.

The consultation paper also considers whether further changes are needed to streamline the handling of antitrust investigations, for example, introducing statutory deadlines. (More, and tighter, statutory deadlines are also considered for merger and market investigations.) There is, of course, an inherent tension between these two objectives, which is not sufficiently acknowledged in the consultation paper.

### **Mandatory merger control filings**

One of the most controversial proposals being consulted upon is the possible introduction of a mandatory, or part-mandatory, system of merger control. At present (in contrast to the EU regime and many other regimes internationally), under the UK merger control regime, a purchaser can complete an acquisition without notifying the OFT and without having to wait for OFT clearance (and will commonly do so if it is confident that there are no significant competition issues). By contrast, under some of the options now being considered, the purchaser would be obliged to notify and could also be prohibited from completing before the CMA had cleared the transaction.

The options outlined in the consultation paper include:

- **Full mandatory system:** If this approach were adopted, all mergers where the UK turnover of the target exceeded £5 million and the worldwide turnover of the purchaser exceeded £10 million would be caught, meaning that virtually all UK mergers of any significance would need to be notified (although it is likely that in many such cases, a short-form notification could be used).
- **Hybrid system:** Under this system, notification of all mergers above the existing £70 million UK turnover threshold would be mandatory. Below that level, notification would continue to be voluntary but the CMA would retain the ability to investigate smaller mergers which satisfied the alternative existing threshold, the 25% share of supply test. This is similar to the US approach to merger control and might also be combined with a legislative exemption for mergers involving smaller businesses.

### ***Is introduction of a mandatory regime inevitable?***

In support of a potential change to a mandatory regime, the Government cites a report from 2007 suggesting that up to half of all potentially anti-competitive mergers may escape scrutiny under the current regime. The consultation paper also notes concerns about the difficulty of subsequently unwinding completed mergers. However, many competition lawyers consider these concerns to be more apparent than real.

The introduction of mandatory merger control regime is a very real possibility, but it appears that the Government remains open to persuasion on this issue and the consultation paper recognises the costs to business that a mandatory system would entail.

Even if it opted to continue with a voluntary regime, the Government could still decide to introduce a "hold separate" requirement designed to prevent further integration between the merging businesses when the CMA decided to investigate. This change might, in itself, result in more businesses deciding to obtain clearance in advance, given the costs and disruption involved in such hold separate arrangements.

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### **Making it easier to prosecute the criminal cartel offence**

The Government is also consulting on a range of options to amend the criminal cartel offence in the Enterprise Act 2002, with a view to making it easier for the CMA to bring successful prosecutions against individuals involved in price-fixing or market-sharing agreements between competing businesses. In particular, it favours the option of removing the requirement for juries to find that the accused acted “dishonestly”; instead, it proposes to exclude, from the scope of the criminal cartel offence, agreements which are made openly. The thinking behind this proposal is that hard-core cartels are usually arranged secretly and that this is a clearer criterion for separating out hard-core cartels than the current dishonesty standard.

Whilst the Government's concern about simplifying prosecutions is, perhaps, understandable against the background of the recent collapse of the BA price-fixing case, it will be important to ensure that the pendulum does not swing too far in the other direction and that only classic hard-core cartels give rise to a risk of criminal sanctions for individuals.

### **Broader market investigations and more of them?**

Another proposal is to widen the scope of market investigations to allow the CMA to investigate practices taking place across multiple markets. At present, the CC cannot investigate multiple markets unless each market has been referred separately to it by the OFT or a sectoral regulator. The consultation paper also asks whether Ministers should have the power to ask the competition authorities to report on other public interest matters as well, although it is not specified at this stage which such matters might be included.

It is also proposed that bodies representing SMEs are added to the current list of consumer bodies that can make “super complaints”. Super complaints must be investigated, at least on an initial basis, and often result in a market investigation being launched into the relevant market.

Though well-intentioned, market investigations often last for extended periods (years rather than months) and entail significant costs for the businesses involved. The resulting uncertainty can also have a chilling effect on the whole sector, inhibiting growth and innovation. A potential concern with the Government's proposals is that they may result in a significantly greater number of market investigations (and investigations that are broader in scope), potentially exposing larger numbers of businesses to these costs and potential chilling effect.

### **Making business pay for the cost of regulation**

The consultation paper contains a number of proposals designed to allow the Government to recover more of the cost of regulation from business. For example, it outlines a number of options for changing the fees charged for merger control filings so as to enable the system to be fully self-funding. It also proposes that businesses which are found to have infringed competition law will not only be liable to pay fines of up to 10% of worldwide turnover but also to pay the costs of the CMA's investigation and those of the CAT (should it decide to appeal).

Whilst it is understandable that the Government is looking at ways of reducing the cost of regulation to taxpayers, these proposals will add substantially to the cost burden on business. In particular, if a mandatory system of merger control is introduced, fees will be levied in respect of many mergers which have no anti-competitive impact whatsoever, a concern acknowledged in the consultation paper. Allowing cost recovery by the CAT could also amount to a disincentive to appeal against decisions – and may mean that questionable decisions by the CMA go unchallenged.

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## A closer relationship with sectoral regulators

Although the Government has decided to allow sectoral regulators (such as Ofgem or Ofcom) to retain their powers to enforce competition law, the consultation paper envisages that the sectoral regulators will work more closely with the CMA in future. The consultation paper also considers whether the sectoral regulators should be required to prioritise competition enforcement over regulatory solutions; they have, in the past, been criticised for relying too heavily on their sector-specific regulatory powers.

## What's the timetable?

The deadline for responses to the consultation is 13 June 2011, with the Government's response expected in the Autumn of this year. The implementing legislation is not expected to be passed until next year, which means that any changes are unlikely to come into effect before 2013 at the earliest. The Government has indicated that it will consult separately on changes to the consumer protection enforcement regime.

If you would like more information or would like to discuss how to make your views known to the Government, please contact Margaret Moore or Nigel Seay.

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## How we can help

Our Competition Department provides pragmatic advice and effective representation on all aspects of EU and UK competition law. We have recognised expertise in advising on the competition and regulatory implications of mergers and acquisitions, as well as the full range of behavioural competition matters (abuse of dominance, cartels and other restrictive agreements). We regularly co-ordinate the provision of competition law advice to clients in respect of other key jurisdictions around the world. We also advise on other EU law matters, such as state aid and public procurement, and on utilities regulation.

*“Top-notch firm Travers Smith LLP is ‘outstanding’ and ‘willing to go the extra mile.’ ”*

The Legal 500 (2010)

*“Margaret Moore ('exceptional', 'very bright', 'a joy to work with')...[is] recommended.”*

The Legal 500 (2010)

*“Nigel Seay has an excellent reputation for merger control and behavioural matters.”*

Chambers Guide to the UK Legal Profession (2011)

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Travers Smith LLP  
10 Snow Hill  
London EC1A 2AL  
T +44 (0)20 7295 3000  
F +44 (0)20 7295 3500



**Margaret Moore**  
**Partner, Head of Competition**  
E: [margaret.moore@traverssmith.com](mailto:margaret.moore@traverssmith.com)  
T: +44 (0) 20 7295 3255



**Nigel Seay**  
**Partner, Competition**  
E: [nigel.seay@traverssmith.com](mailto:nigel.seay@traverssmith.com)  
T: +44 (0) 20 7295 3416